MOTION FILED
JUL 22 1992

Supreme Court, U.S.
JUL 27 1992

NO. 91-2078

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

MARION LIBBIE KAMISUGI,
Petitioner,
v.
HEINZ KUHNERT and SHERILYN MARIE KUHNERT,
Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI and AMICUS CURIAE BRIEF OF THE HAWAII ASSOCIATION OF REALTORS To the Supreme Court of the State of Hawaii

WAYNE M. PITLUCK
Counsel of Record
701 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 523-5030
Attorney for Applicant
Hawaii Association of
REALTORS

Of Counsel:
PITLUCK & KIDO
Dated: July 22, 1992

NO. 91-2078

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MARION LIBBIE KAMISUGI,
Petitioner,

v.

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,
Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Hawaii

WAYNE M. PITLUCK
Counsel of Record
701 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 523-5030
Attorney for Applicant
Hawaii Association of
REALTORS

The Hawaii Association of REALTORS ("HAR") respectfully moves this court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorneys for the Petitioner herein has been obtained, but the attorney for the Respondents herein refused to consent to the filing of a brief by HAR as amicus curiae.

The applicant, HAR, has an interest in this case in that it is a not-for-profit professional association of approximately 9,100 real estate licensees engaged in all facets of the real estate business including, but not limited to, brokerage, marketing, appraising, management, syndication, and counseling. The impact of the Hawaii court judgment, if allowed to stand, will have a severe and crippling affect on the real estate industry throughout the State of Hawaii.

The Petition for Writ of Certiorari of the Petitioner herein argues that the Hawaii court violated the Due Process Clause of the Fourteenth Amendment when it assessed punitive damages against Petitioner contrary to the guidelines set by this Court in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. __, 111 S.Ct. 1032, (1991). The Petitioner also argues that the Hawaii court wrongly considered a co-defendant's wealth when it assessed the amount of punitive damages against Petitioner, in violation of this Court's decision in Washington Gaslight Co. v. Landsen, 172 U.S. 534, 19 S.Ct. 296 (1899). The Petitioner's arguments do not address the impact of the Hawaii court's judgment on the real estate industry as a whole, and applicant has no reason to believe that this argument will be made

other than by applicant. If applicant's argument is approved by this Court, the decisions of the courts below must be reversed.

Dated: July 22, 1992

Respectfully submitted,

WAYNE M. PITLUCK
Counsel for Record
701 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 523-5030
Attorney for Applicant
Hawaii Association of
REALTORS

Of Counsel:
PITLUCK & KIDO

NO. 91-2078

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MARION LIBBIE KAMISUGI,
Petitioner,

v.

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the
State of Hawaii

The Hawaii Association of REALTORS respectfully submits this Amicus Curiae Brief in support of Petitioner Marion Libbie Kamisugi's Petition for Writ of Certiorari to review the Judgment on Appeal entered by the Supreme Court of Hawaii on March 25, 1992.

TABLE OF CONTENTS

INTEREST OF THE HAWAII ASSOCIATION OF REALTORS 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

I. THE JUDGMENT OF THE HAWAII COURT HAS DEPRIVED THE PETITIONER OF DUE PROCESS 4

A. The Hawaii Court Improperly Pierced the Corporate Veil to Hold the Petitioner Liable for Punitive Damages 4

B. The Hawaii Court Improperly Found Petitioner to be Party to a Conspiracy Without Conspiracy Having Been Pled or Proven 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases — Page

Chung v. Animal Clinic, Inc., 63 Haw. 642, 636, P.2d 721 (1981) 5

Doleman v. Meiji Mutual Life Insurance Co., 727 F.2d 1480 (9th Cir. 1984) 6

INTEREST OF THE HAWAII ASSOCIATION OF REALTORS

The Hawaii Association of REALTORS ("HAR") and its members have a critical interest in the issues presented for review in this case. HAR is a not-for-profit professional association of persons engaged in all phases of the real estate business in Hawaii including, but not limited to, brokerage, marketing, appraising, management, syndication, and counseling. HAR has a statewide membership of approximately 9,100 real estate licensees, the great majority of whom engage in the sale and resale of residences in the State of Hawaii. Among the 9,100 real estate licensees who are members of HAR, there are approximately 2,100 individuals who own and operate businesses dealing with real estate; and these companies, in turn, employ or contract with real estate licensees as agents.

HAR takes no position with respect to the merits of the case or the findings of fact. However, certain elements of the judgment sustained by the Supreme Court of Hawaii, if allowed to stand, could have a significant negative impact upon the business of real estate in Hawaii. It is to these discreet issues that this Amicus Curiae Brief is directed.

The judgment, on its face, improperly holds an individual shareholder or principal broker of a real estate company personally liable for compensatory damages, and jointly and severally liable for punitive damages, arising out of misconduct by licensees employed by or contracting with the company. HAR, as amicus curiae, is able to offer the Court the perspective of the potential destructive impact of the Hawaii court's judgment on the real estate industry.

SUMMARY OF THE ARGUMENT

The judgment of the Hawaii court raises constitutional issues of significant importance. The judgment, if applied as precedent, would deprive owners and principal brokers of real estate companies of their due process rights. First, the judgment ignores basic well-established rules of law regarding the separate legal existence of the corporate entity, distinguishable from its shareholders. Secondly, the judgment ignores Hawaii case law which sets forth the test to disregard the corporate entity and "pierce the corporate veil." Finally, the judgment against the shareholder or principal broker relies upon the trial court's presumption of a conspiracy among the defendants, despite the fact that no such allegation was pled.

STATEMENT OF THE CASE

The Petitioner, Marion Libbie Kamisugi ("Petitioner"), seeks a writ of certiorari from this Court to review the Hawaii trial court's judgment of $948,360.00 in compensatory and punitive damages assessed jointly and severally against her and a Co-defendant, Libbie & Company ("the Company").

Petitioner is the primary shareholder and principal broker of the Company. The Company is a Hawaii corporation of good standing which is individually and separately licensed by the State of Hawaii. On or about August 23, 1982, Heinz and Sherilyn Kuhnert ("the Respondents"), entered into an exclusive listing agreement with the Company for the right to market Respondents' residence ("the Property"). The Company was represented by Co-defendant licensee, Clyde Allison ("Allison"), who signed the listing agreement on behalf of the Company and was, at the time,

employed by the Company. Thus, there were three separate and distinct real estate licensee entities involved in the transaction on behalf of the Respondents: (1) Allison, their agent, who was directly involved in all aspects of the transaction; (2) the Company, with which the Respondents contracted to market the Property, and employer of Allison; and (3) the Petitioner, shareholder, and principal broker of the Company, who was not directly involved in the transaction, but who fulfilled her statutory responsibilities by supervising Allison and acting as a general resource of real estate transactional information.

Based upon the Petition, despite the absence of any evidence of personal wrongdoing on the part of Petitioner, the trial court rendered a judgment, which included punitive damages against the Company and the Petitioner, jointly and severally, totalling nearly one million dollars. In rendering its judgment, the trial court totally ignored the distinction between the corporate entity of the Company and the Petitioner. In addition, and as a means of justifying the inclusion of the Petitioner in the judgment, the trial court appears to have relied upon a theory of a conspiracy among the defendants, despite the fact that a conspiracy claim was never pled. The judgment was sustained on appeal to the Supreme Court of the State of Hawaii.

REASONS FOR GRANTING THE WRIT

This case warrants immediate review by this Court in order to prevent a chilling effect upon the real estate industry in Hawaii. By its disregard of established law, the Hawaii court has declared that any owner or principal broker of a real estate company is personally jointly and severally liable for compensatory and punitive damages for acts of licensee employees of the company, irrespective of whether the

owner or principal broker is shown to have been involved in the misconduct. Such an owner, it is reasoned, is liable purely because of the fact of ownership or their role as principal broker, or on a conspiracy theory, even where such conspiracy theory is not pled.

The practical effect of this judgment is to put the personal assets of a shareholder or a principal broker of a real estate company at risk in each and every transaction conducted by a licensee employee of that company, without regard to the participation or culpability of the said shareholder/principal broker. Such potential exposure places an extraordinary risk upon such individual, distinct from any other industry, and may force many persons to cease business rather than risk all of their personal assets and those of their family. Those that remain could lose all of their personal assets as a result of a judgment resulting from the acts of any of their company's licensee employees. Such a result is untenable, unjust, and without precedent in law.

I. THE JUDGMENT OF THE HAWAII COURT HAS DEPRIVED THE PETITIONER OF DUE PROCESS

For all of the reasons set forth in the Petition for Writ of Certiorari, Petitioner has been deprived of her rights to due process as guaranteed under the United States Constitution and the Hawaii Constitution. In particular, the Hawaii Court deprived the Petitioner of her due process rights by virtually ignoring two well established legal tenets.

A. The Hawaii Court Improperly Pierced the Corporate Veil to Hold the Petitioner Liable for Punitive Damages. The Hawaii Supreme Court has previously recognized the well-established law regarding the distinction

between a corporation and its shareholders, as well as the circumstances which must be present before a court will disregard the corporate entity and "pierce the corporate veil." In Chung v. Animal Clinic, Inc., 63 Haw. 642, 636, P.2d 721 (1981), the Hawaii Supreme Court stated:

> The general rule is that a corporation and its shareholders are to be treated as distinct legal entities. The corporate 'veil' will be pierced and the legal entity of the corporation will be disregarded only where recognition of the corporate fiction would bring about injustice and inequity or when there is evidence that the corporate fiction has been used to perpetrate a fraud or defeat a rightful claim. (citations omitted).

63 Haw. at 645, 636, P.2d at 723.

The Hawaii trial court made no finding, nor was any evidence apparently presented, to show that recognition of the Company would "perpetrate a fraud or defeat a rightful claim" nor was there any finding that recognizing the existence of the Company "would bring about injustice or inequity." Only by such findings could the court disregard the corporate entity and "pierce the corporate veil." Nevertheless, the Hawaii court, by its judgment, has effectively disregarded the legal corporate existence of the Company to hold Petitioner personally liable for almost a million dollars in punitive damages.

B. The Hawaii Court Improperly Found Petitioner to be Party to a Conspiracy Without Conspiracy Having Been Pled or Proven. The Respondents did not allege that the defendants conspired to defraud them.

Nevertheless, the Hawaii court found that the defendants "conspired" between themselves to defraud the Respondents. By this unilateral action, the court justified a finding of personal liability against Petitioner, thereby depriving her of her due process rights.

In Doleman v. Meiji Mutual Life Insurance Co., 727 F.2d 1480 (9th Cir. 1984), the Ninth Circuit defined civil conspiracy as "a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." (citation omitted) 727 F.2d at 1482. Furthermore, the court states that "the existence of an alleged civil conspiracy must be established by clear, cogent, and convincing evidence." (citation omitted) 727 F.2d at 1483. Finding that a conspiracy allegation had not been pled, the court in the Doleman case refused to recognize a claim under a conspiracy theory.

Similarly, in the present case, no allegation of conspiracy among the various defendants was pled by the Respondents. The Hawaii court did not have the authority to find that Petitioner "conspired" with the other defendants to defraud the Respondents. Furthermore, since conspiracy was never an issue before the court, there is no "clear, cogent, and convincing evidence" to establish a finding of conspiracy.

CONCLUSION

The misinterpretation or misapplications of the law by the Hawaii court has resulted in a denial of due process to the Petitioner and created the potential for a chilling effect on the entire real estate brokerage industry. By its decision, the Hawaii court has unjustly determined that one industry,

among all others, should have long-established law applied to it differently. For the reasons discussed above, the Hawaii Association of REALTORS supports the Petitioner's request that a writ of certiorari to the Supreme Court of Hawaii be issued by this Court.

DATED: July 22, 1992

Respectfully submitted,

WAYNE M. PITLUCK
Counsel of Record
701 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 523-5030
Attorney for Applicant
Hawaii Association of
REALTORS

Of Counsel:
PITLUCK & KIDO